

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001-2714
TEL: (202) 442-9094
FAX: (202) 442-4789

JOHN BUCKINGHAM,

Petitioner,

v.

SUNRISE ASSISTED LIVING,

Respondent.

Case No.: 2011-DOH-00009

FINAL ORDER

I. Introduction

At issue is the legality of a proposed discharge from an assisted living facility for nonpayment. This case arises under the Nursing Home and Community Residence Facility Residents' Protections Act of 1985, D.C. Official Code §§ 44-1001.01 *et seq.* (the Act), Title 22, Chapter 32 of the District of Columbia Municipal Regulations (DCMR), Title 42, Part 483, Sub-Part B, of the Code of Federal Regulations (CFR). For reasons explained below, I conclude that Sunrise met its burden of proving the legality of the discharge.

After three status conferences in this matter, and no progress on the issue of payment to Respondent Sunrise Assisted Living (the Facility), or an agreed discharge schedule, I convened an evidentiary hearing on June 3, 2011. David Buckingham¹, Petitioner's son, represented the Petitioner. Dan and Tom Buckingham, also sons of the Petitioner, appeared and testified. Carrie

¹ David Buckingham practices law in Raleigh, North Carolina and is an inactive member of the District of Columbia bar.

Nixon, Esquire, and Nancy Viosin represented Sunrise Assisted Living (the Facility). Tanya Walker, Senior Executive Director of the Facility, appeared and testified. Mary Ann Parker, Esquire, Lydia Williams, and Lynn Person from the Long-Term Care Ombudsman Program also appeared.

II. Findings of Fact

1. Petitioner, an elderly man incapacitated by physical and mental illness, entered the Facility on October 12, 2010. At that time, Tom Buckingham, signed an Agreement making him Petitioner's representative for, among other things, all financial matters relating to his stay at the Facility. Respondent's Exhibit (RX) 205 at 37.

2. In November 2010, David Buckingham met Tanya Walker at the Facility. On December 22, 2010, David Buckingham was appointed temporary guardian of Petitioner by a Maryland Probate Court, although he did not inform the Facility about the appointment. David Buckingham acquiesced to his father's residency at the Facility.

3. A few months after Petitioner's initial stay at the Facility, Tom Buckingham failed to make the payments on Petitioner's behalf. RX 201.

4. Partial payments were made in November 2010 (\$5,800), January 2011 (\$2,000) and March 2011 (\$5,000) by Tom and David Buckingham in efforts to allow their father to remain at the Facility.

5. Petitioner currently owes the Facility \$80,353.61 for his care and despite the Facility's repeated efforts to contact Tom Buckingham to make arrangements to pay this arrearage, the amount is still pending. RX 201.

6. On April 1, 2011, the Facility provided Petitioner and David Buckingham with written and oral notice of Petitioner's discharge (*i.e.*, the Advance Notice), effective April 29, 2011.

7. In support of its position, the Facility sent a "Termination of Residency Agreement" outlining the reason for discharge and its intention to assist in a safe discharge. RX 200.

8. Tanya Walker, the Facility's Executive Director devised a detailed Discharge Plan, where Petitioner is to be discharged to his wife Elizabeth Buckingham with hospice and 24 hour private duty home care assistance. RX 207.

9. The Discharge Plan states that Petitioner is to be discharged to his wife's home on 17 Darby Court, Bethesda, Maryland, through transportation provided by the Facility. Further, the 24 hour care and additional hospice support costs will be paid by the Facility as well. RX 207 and 208.

10. Ms. Walker proposed the plan to David Buckingham two weeks before the hearing and faxed him a written plan the day before the hearing.

III. Discussion and Conclusions of Law

The issues in this case are: (1) whether timely oral and written notice of the proposed discharge was given to Petitioner and his representative; and (2) whether there are sufficient grounds for the discharge. David Buckingham does not contest the claim of nonpayment but objects to the discharge plan. Attorney Parker from the Long Term Care Ombudsman Program did not object to the discharge or the plan.

In order to involuntarily discharge a resident, the Facility has the burden of proving the existence of one of the five grounds listed in the Act, and it must do this by clear and convincing evidence. D.C. Official Code §§ 44-1003.03(b) and (c).

A. Notice

The Facility must give the resident and the resident's representative at least 21 days written and oral notice before the discharge takes place. § 44-1003.02 of the Act.² The written and oral notice must provide the "reasons for, procedures for contesting, and proposed effective date of the discharge." *Id.*

A resident's representative may be designated by the resident or appointed by a court. § 44-1001.01(11)(A), (B) of the Act. If no representative has been so designated or appointed,

² In addition to advance oral and written notice of the discharge, § 44-1003.04 of the Act requires the facility to discuss the reasons for the move with the resident and his or her representative and answer questions they may have about the written notice. The contents of this discussion must be summarized in writing and be made a part of the resident's clinical record.

the Long-Term Care Ombudsman serves as the resident's representative. § 44-1001.01(11)(C) of the Act. In this case, David T. Buckingham became Petitioner's legal guardian in January 2011, by court appointment.

B. Grounds for Involuntary Discharge

Absent consent of the resident and his or her representative, the Facility may discharge a resident on one of five grounds:

1. If the discharge is "essential to meet that resident's documented health-care needs or to be in accordance with his or her prescribed level of care;"
2. If the discharge is "essential to safeguard that resident or one or more other residents from physical or emotional injury;"
3. "On account of nonpayment for his or her maintenance," with certain exceptions not relevant here;
4. If the discharge is "essential to meet the facility's reasonable administrative needs and no practicable alternative is available;" and
5. "If the facility is closing or officially reducing its licensed capacity."

See D.C. Official Code § 44-1003.01.

A resident of a nursing facility may be discharged on account of nonpayment for his or her maintenance, so long as adequate discharge planning and assessments have been provided to the resident. D.C. Official Code § 44-1003.01(a)(3); and 42 CFR § 483.12(a)(2)(v). Petitioner's unpaid bills currently amount to \$80,353.61. *See* RX 201. In addition, despite the Facility's numerous and, indeed commendable, efforts to work with the Buckingham family to address this serious arrearage, the sons responsible for his care have made themselves largely unavailable and uncooperative. *See* RX 205, 200, 201 and 207.

Although growing costs of elder care and an emotional toll weigh on the children of a parent with a mental illness, not paying the Facility would render the Facility incapable of providing the level of care that the Buckinghams commend the Facility for having.

The Facility has established by clear and convincing evidence that Petitioner may be discharged for nonpayment under Federal and District of Columbia law. *See* D.C. Official Code § 44-1003.01(a)(3); 42 CFR § 483.12(a)(2)(v), *see also* §§ 44-1003.03(c) (requiring ground for discharge be established by clear and convincing evidence). In addition, appropriate discharge planning and assessments have taken place in this case in accordance with the requirements of D.C. Official Code § 44-1003.04 and 44-1003.10.

The parties should cooperate fully with each other now and in the coming weeks following his discharge, to ensure that Petitioner, who has placed his trust and, indeed, his life, in the parties' hands, suffers as little disruption as possible with respect to his placement change, and continues to be supported in a safe, appropriate and healthy environment.

IV. Order

Therefore, upon the foregoing findings of fact and conclusions of law, it is hereby, this 7th day of June, 2011:

ORDERED, that, Petitioner John Buckingham may be **DISCHARGED** by Respondent Sunrise Assisted Living pursuant to the April 1, 2011 Advance Notice; and it is further

ORDERED, that, pursuant to D.C. Official Code § 44-1003.03(c)(1), Petitioner John Buckingham shall not be discharged before the 5th calendar day following his notification of this

Final Order, unless a condition set forth in D.C. Official Code §§ 44-1003.02(b)(1) and (2) occurs in the interim; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are set forth below.

Margaret Mangan
Administrative Law Judge